

# **Animal Rights and the Argument from Marginal Cases**

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## 1 Introduction

The ‘argument from marginal cases’ (hereinafter the ‘AMC’) is one of the most powerful and often used of those put forward by defenders of animal rights. The argument can be formulated and understood in many different ways, but when used in support of animal rights, its basic idea is roughly as follows: if we grant rights to human beings who are in some sense ‘marginal’ – i.e. those who lack the capacity of normal adults – then we should also grant rights to non-human animals, since they do not differ in relevant ways from those marginal human beings.<sup>1</sup> People with severe intellectual disabilities<sup>2</sup> and small children are the most frequently cited examples of marginal human beings.

Although the AMC originated and is widely used in the general philosophical discussion about the rights and moral status of animals, a similar argument is also frequently employed in the somewhat more analytical and technical debate between the interest and will theories of rights. Interest theorists, who view the function of rights as protecting important interests, accuse will theorists of being incapable of taking the rights of cognitively disabled people (or the rights of small children) into account. The will theory connects rights with autonomy and freedom to choose, and intellectually disabled and small children are thought to lack those qualities. Therefore, if they have rights, these can only be interest theory rights. But if the criterion for right-holding is something other than autonomy, then it should not be impossible to grant rights to non-human animals also. Generally speaking, interest theorists are in favour of animal rights,<sup>3</sup> and

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<sup>1</sup> This argument is also known as ‘the argument from species overlap’ in order to avoid using the potentially offensive term ‘marginal humans’ (e.g. Joe Wills adopts this terminology in his recent article; see Joe Wills, ‘Animal rights, legal personhood, and cognitive capacity: addressing “levelling-down” concerns’, *Journal of Human Rights and the Environment*, Vol. 11 No. 2, September 2020, p. 200). I stick to the old terminology since my aim is to criticise this argument, and in this way prevent, rather than advance, the marginalisation of any group of human beings.

<sup>2</sup> Within the philosophical debate, and also in this article, various terms are used for these people, including ‘mentally disabled’, ‘mentally enfeebled’, ‘cognitively disabled’, or ‘mentally retarded’. The officially used definition nowadays is ‘disorder of intellectual development’. The International Classification of Diseases 11th Revision (ICD-11) of the World Health Organization (WHO) specifies that this refers to ‘a group of etiologically diverse conditions originating during the developmental period characterised by significantly below average intellectual functioning and adaptive behaviour’. Disorders of intellectual development can be classified into mild, moderate, severe and profound. In the last category – which is perhaps most often presupposed in the philosophical debate – the ‘[a]ffected persons possess very limited communication abilities and capacity for acquisition of academic skills is restricted to basic concrete skills. They may also have co-occurring motor and sensory impairments and typically require daily support in a supervised environment for adequate care.’ See *WHO’s International Statistical Classification of Diseases and Related Health Problems* at <https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2fid%2fentity%2f605267007> (accessed 30 September 2020).

<sup>3</sup> These theorists are discussed later in the article. Not all interest theorists, however, are willing to extend rights to animals. See, e.g., Joseph Raz, ‘On the Nature of Rights’, *Mind*, Vol. 93, No. 370, April 1984, pp. 194-214.

the debate between the will and interest theories is partly a debate about whether animals can have rights.<sup>4</sup>

In this article I argue that the AMC and interest theorists' criticisms of the will theory are based on an outdated conception of the purpose of the rights of people with disabilities, and on a dubious conception of autonomy. The recent paradigm shift in how the rights of disabled persons – including those with intellectual disabilities – are understood emphasises their autonomy and equal legal capacity as compared with people who do not have such disabilities.<sup>5</sup> Philosophically, this understanding can be supported by conceptualising autonomy in relational terms, i.e. so that it is made visible that autonomy is always exercised within and dependent on a complex web of social relationships that can prevent, but also enable, the autonomy of even seriously intellectually disabled persons. With suitable social support there is no hindrance to their making choices and decisions regarding their own lives, and thus no hindrance to their having will-theory rights. Thus, insofar as animal rights are defended by appealing to the lack of autonomy of mentally disabled people, the argument is, in my view, flawed.

## 2 An Outline of the AMC

I begin by outlining the argument from marginal cases in general terms, without connecting it with the debate about rights. Described broadly, the AMC is targeted against those who wish to draw a moral boundary between human and non-human animals. This boundary is erected by appealing to some property or capacity 'X' that humans have that grounds their having some moral property 'Y'. ('X' may include, for example, rationality, free will, autonomy, capacity for reciprocal relations, self-consciousness, or sentience; while 'Y' may include, for example, being an end in itself, having direct moral status, being a right-holder, or having a right to life.) Proponents of the AMC focus on property X and point out that the way in which this property is distributed as between individuals does not respect the human-animal divide. Therefore, neither should the distribution of moral property Y respect the human-animal divide. The ascription of moral property Y should track the distribution of property X: if it doesn't, one is not consistent, or rational, or does not respect the principle 'like cases must be treated alike'. Thus, the argument has sometimes also been referred to as 'the argument for moral consistency'.<sup>6</sup>

Hence the focus in the AMC is on *properties and capacities of individuals*. The point of the argument is to show how difficult it is to find a property that grounds a certain moral position for *all* humans while denying it to all non-

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<sup>4</sup> Of course, the debate is also about many other things, such as whether there can be inalienable rights or whether third-party beneficiaries are right-holders. For a comprehensive overview of the debate between the will and interest theories, see Matthew H. Kramer, N. E. Simmonds and Hillel Steiner, *A Debate Over Rights* (OUP, 1998).

<sup>5</sup> This article does not draw a sharp distinction between legal and moral rights but focuses primarily on rights enshrined in the UN Convention on the Rights of Persons with Disabilities, which, in my view, are simultaneously legal and moral in character.

<sup>6</sup> See Daniel A. Dombrowski, *Babies and Beasts: The Argument from Marginal Cases* (University of Illinois Press, 1997), p. 24.

human animals. The property cannot be such that it sets the threshold for the moral position too high, but neither can it be such that it sets it too low. In the former case some humans would lack the property, and hence the moral position, in question (the problem of under-inclusiveness); while in the latter case some non-human animals would also have the property, and hence the moral position, in question (the problem of over-inclusiveness). (The property can also be one that is under and over-inclusive at the same time: some humans lack it, while some animals have it.) Proponents of the AMC argue that the problem of under and over-inclusiveness cannot be avoided. The only way to hold onto a boundary is to assert that the superior moral position of human beings rests simply on the property of *being human*. But this would be to embrace speciesism, which, it is assumed, no serious scholar wants to do. Speciesism is equated with racism and sexism, i.e. with other views that disregard an *individual's* abilities and capacities, and instead treat her as simply a member of a (discriminated against) group. If we oppose treating someone as merely a member of some ethnic group, instead of as an individual, then we should also oppose treating them as merely a member of some species, since this equally ignores their individuality.<sup>7</sup> Appealing to criteria such as 'having a soul', or 'being made in the image of God', which depend on contestable religious views, are other non-starters in the attempt to distinguish human beings from animals.<sup>8</sup>

The argument is called the argument from *marginal* cases because it entails specific attention being paid to human beings whose characteristics deviate in certain respects from those of normally functioning adults, which brings to light the problems of under and over-inclusiveness. If the property that grounds the moral position is, for example, possession of developed cognitive abilities (such as the ability to use language and reason abstractly), proponents of the AMC will point out that there are human beings, such as infants and those that have severe cognitive impairments, who lack those abilities; and that, on the other hand, some animals, for example higher primates, have highly developed cognitive abilities. If the threshold is lowered and a property (e.g. sentience) is found that covers all human beings, including 'marginal' cases, then one must admit that many non-human animals possess that same property. In other words, the AMC rests on a comparison between non-human animals and non-paradigmatic human beings, and on the finding that non-human animals are equal to, or even superior to, marginal human beings in respect of some capacity X.

Proponents of the AMC argue that the only way to solve the problem of under and over-inclusiveness is to revise our views about the distribution of the moral position in question. There are three possibilities in respect of such revision:

- (1) Raising the position of animals, i.e. granting them the same moral property Y that we grant to marginal human beings (who are comparable to animals in their capacities).

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<sup>7</sup> On the charge of speciesism, see Peter Singer, *Practical Ethics* (Cambridge University Press, 1979), pp. 65-66; and Dombrowski 1997, p. 14.

<sup>8</sup> For example, according to Bryan C. Pilkington, '[t]hat human beings were created in God's image offers resources to answer questions about what we are and who counts as one of us', Bryan C. Pilkington, 'Putting Image into Practice: *Imago Dei*, Dignity, and Their Bioethical Import', *Christian Bioethics*, 23(3) (2017), p. 303.

- (2) Levelling down marginal humans, i.e. withholding from them the moral property Y that we also withhold from animals (who are comparable to marginal humans in their capacities).
- (3) Doing both: elevating the moral position of some animals, while lowering the moral position of some human beings.<sup>9</sup>

Arguably, the AMC is at its strongest if it chooses revision option 1: most people would shrink from accepting a theory that leads to morally ‘downgrading’ any group of human beings. However, option 3 also has its proponents (as far as I know, the AMC is never used *solely* to downgrade marginal human beings, without upgrading any animals<sup>10</sup>). For example, Peter Singer wants to take all sentient beings’ interests equally into consideration (which means improving the position of many non-human animals); and he also wants to grant the status of personhood to all mentally developed beings, whether they are humans or animals. But Singer allows that mentally undeveloped animals are ‘replaceable’. That is, it is not wrong to kill them if they have had a pleasant life, are killed painlessly, and are replaced by similar animals (so that the overall amount of pleasure in the world is not diminished). However, moral consistency demands that mentally undeveloped humans are also replaceable:

As long as the lives of children [that have a disorder of intellectual development] are pleasant, it would not, according to the replaceability argument, be wrong to perform a scientific experiment on a child that results in the death of the child, provided another child could then be conceived to take its place.<sup>11</sup>

This view is too extreme for most other proponents of the AMC, such as Tom Regan and Daniel Dombrowski.<sup>12</sup> Even if the moral property in question were less significant than ‘having a right to life’, the prevailing view seems to be that any kind of lowering of the moral status of humans is unacceptable. Moral

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<sup>9</sup> This list takes its cue from Peter Singer’s threefold distinction, although the vocabulary differs from Singer’s. See Peter Singer, ‘Animals and the Value of Life’, in Tom Regan (ed.), *Matters of Life and Death* (Temple University Press, 1980), p. 234; quoted in Dombrowski 1997, p. 19. Joe Wills labels these options *levelling up moral status*, *levelling down moral status*, and *levelling out moral status* (Wills 2020, p. 204).

<sup>10</sup> Joe Wills cites R. G. Frey as an example of a leveller-down (Wills 2020, p. 204, fn. 32). Supposedly this is because Frey connects the value of life with *quality* of life, and says straightforwardly, for example, that ‘the lives of normal (adult) humans betray a variety and richness that the lives of animals, defective humans, and infants do not’, and therefore ‘if we are to continue to use animals for research purposes, then we must begin to envisage the use of some humans for those same purposes’, R. G. Frey, ‘Moral Standing, the Value of Life, and Speciesism’, *Between the Species*: Vol. 4, issue 3 (1988), pp. 196, 201. However, Frey also says that ‘because some human lives fall drastically below the quality of life of normal (adult) human life, we must face the prospect that the lives of some perfectly healthy animals have a higher quality and greater value than the lives of some humans’. (ibid., p. 196) Thus, Frey also seems to favour revision option 3 (‘levelling out’) over option 2 (‘levelling down’).

<sup>11</sup> Singer 1980, p. 244, quoted in Dombrowski 1997, p. 20. Jeff MacMahan is another philosopher who questions the moral status of radically cognitively impaired people. See, e.g., Jeff MacMahan, ‘Radical Cognitive Limitation’, in Kimberley Brownlee and Adam Cureton (eds.), *Disability and Disadvantage* (OUP, 2009), pp. 240-259.

<sup>12</sup> See, e.g., Dombrowski 1997, p. 179.

consistency is to be achieved by changing our attitudes towards animals, without altering our moral intuitions regarding non-paradigmatic human beings.

Thus, we can say that the persuasive force of the AMC rests on these two widely shared suppositions: (1) we want to be consistent in our moral thinking, and (2) we do not want to lower the moral position of any human being. In the actual formulations of the AMC – to which we finally come – both of these suppositions are often present. Scott Wilson's formulation is a good example:

- (1) If we are justified in attributing moral property *P* to such marginal cases as the senile, the severely mentally handicapped, infants, etc., then we are likewise justified in attributing moral property *P* to animals.
- (2) We are justified in attributing moral property *P* to the marginal cases.
- (3) Therefore, we are justified in attributing moral property *P* to animals.<sup>13</sup>

To take a more concrete example, i.e. one in which the moral property *P* is specified, let's look at Tom Regan's formulation. Regan uses the AMC to defend the argument that some non-human animals have rights:

1. Humans, including those that are marginal, have rights and therefore belong in the class of right-holders.
2. However, given the most reasonable criterion of the possession of rights, one that enables us to include marginal humans in the class of right-holders, this same criterion will require us to include some (but not all) animals in this class.
3. Therefore, if we include these marginal humans in the class of right-holders, we must also include some animals in this class.<sup>14</sup>

These two formulations of the AMC, in addition to illustrating the demands for moral consistency and the unacceptability of lowering the moral position of marginal human beings, also show clearly the need for the next step – specifying the criterion for the possession of the moral property in question. Since this article focuses on rights, let's continue with Regan's version of the AMC. What right-holding criterion justifies ascribing rights to marginal human beings?

[I]f, as I think, in our search for the most adequate theory to account for our settled moral convictions we are driven to postulate that morons (even) have certain rights, it remains to be asked what there is about them that could serve as the ground or basis of the rights they have, if they have them. Singer, I think, has argued persuasively that it cannot be the fact that they are human beings... that is to mark moral boundaries in a way which invites comparisons to racism and sexism. Nor can it be argued that morons have the rights they do, if they do, because they are autonomous or very intelligent; they are not... Rather, if there is some basis for their having rights, *it must be something about the capacities of the morons themselves...* Many, many animals will satisfy the grounds in question. Take, for example,

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<sup>13</sup> Scott Wilson, 'Carruthers and the Argument from Marginal Cases', *Journal of Applied Philosophy*, Vol. 18, No. 2, (2001), p. 136.

<sup>14</sup> Tom Regan, 'An Examination and Defense of One Argument Concerning Animal Rights', *Inquiry* 22 (1979), p. 196, quoted in Dombrowski 1997, pp. 27-28.

Singer's mention of 'the capacity to experience pain and/or enjoyment.' That seems to me to be a very strong candidate for grounding rights in the case of human morons.<sup>15</sup>

Regan modifies Singer's criterion into the idea that those beings who are *subjects of a life* have *inherent value*, and therefore have moral rights. 'Subjects of a life' are beings that have a life of their own that can go well or badly for them, and that have value independently of their utility for anyone else.<sup>16</sup> This criterion covers infants and mentally enfeebled human beings, as well as many non-human animals. However, it does not cover the most marginal of marginal cases – that of irreversibly comatose people – to which we return below.

This outline of the AMC has brought us to the question of whether animals can be said to have rights. Let us now see how the AMC is employed in the debate between the will and interest theories of rights, which is also partly a debate about animal rights.

### 3 The Role of the AMC in the Debate between the Will and Interest Theories of Rights

In modern analytical jurisprudence (or legal philosophy), there are two competing theories about the nature of rights. The interest theory holds that 'the essence of a right consists in the normative protection of some aspect(s) of the right-holder's well-being', while under the will theory, 'the essence of a right consists in opportunities for the right-holder to make normatively significant choices relating to the behavior of someone else'.<sup>17</sup> Thus the interest theory views the function of rights as being to protect the right-holder's interests (and interests are connected to wellbeing), while under the will theory the point of rights is to facilitate or protect the right-holder's autonomy and freedom of choice.

Although it is not explicitly referred to by that name, an argument that is in its essence the same as the AMC is frequently employed by interest theorists to criticise the will theory. The standard criticism of the will theory is that it cannot account for the rights of those who are unable to make autonomous choices (and thus unable to control the behaviour of other people, for example by releasing them from their duties towards right-holders). Since small children and severely mentally disabled persons are not deemed to be self-determining agents who are capable of making rational choices, they cannot have will-theory rights. Many find this consequence of the will theory morally appalling, in addition to flying

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<sup>15</sup> Tom Regan, 'Utilitarianism, Vegetarianism, and Animal Rights', *Philosophy and Public Affairs* 9 (1980), pp. 313-315, quoted in Dombrowski 1997, pp. 33-34. It should be noted that although nowadays the term 'moron' sounds insulting and is no longer used (except as an insult), it was formerly used as a technical term to describe people whose IQ was between 50 and 75, and whose mental age was between 8 and 12. See Dombrowski 1997, p. 4. (Likewise, 'imbecile' and 'idiot' were similarly used to denote technical categories, and it was common to talk of mentally 'retarded' people, instead of persons with disabilities).

<sup>16</sup> Tom Regan, *The Case for Animal Rights* (University of California Press, 1983), pp. 243-244.

<sup>17</sup> Matthew H. Kramer, 'Do Animals and Dead People Have Legal Rights', *Canadian Journal of Law and Jurisprudence* 14, no. 1 (January 2001), p. 29.

in the face of legal reality: children and disabled persons surely have legal rights, and a theory that cannot account for this fact is dubious, to say the least.

This criticism of the will theory has obvious similarities with AMC, in that it appeals to the intuition that we shouldn't accept a theory that leads to the lowering of the moral position of some group of human beings. This is implicit, for example, in Neil MacCormick's concise rebuttal of the will theory:

Some theorists explain rights by reference to will, others by reference to interest. That children have rights is inexplicable in terms of the former sort of theory. A modified form of interest theory must therefore be accepted.<sup>18</sup>

MacCormick's worry is that if one adopts the will theory of rights, one is forced to admit that children must be denied the property of 'being a right-holder'. However, he opines that denying children rights is 'a plain case of moral blindness'<sup>19</sup> and, therefore, the interest theory is to be preferred. Of course, this is not a full-fledged AMC since MacCormick does not use it to defend animal rights, although he hints at this possibility.<sup>20</sup>

Matthew Kramer, instead, adopts a more explicit version of the AMC that includes a defence of the possibility of animal legal rights:

A striking corollary of the Will Theory is that animals, infants, comatose people, senile people, and dead people do not have any legal rights. Such creatures are not competent to form or express their wishes with the elementary degree of precision and reliability that would be necessary for the full-fledged exercise of any legal power of enforcement/waiver.... The Interest Theory leads to quite a different stance. By focusing on the preservation of well-being rather than on the exercise of choice, it leaves open the possibility of ascribing legal rights to animals and dead people and mentally incapacitated people. Ascriptions of legal rights to such creatures are not disallowed at a conceptual level. Because various aspects of the well-being of animals and dead people and mentally infirm people can receive essential protection from legal norms, the Interest Theory lets us classify those creatures as potential right-holders.... Indeed, the Interest Theory's receptiveness to the idea of infants' rights and mentally incapacitated people's rights is one of the many virtues of that theory. Quite outlandish are the Will Theorists' denials that infants and senile people have legal rights<sup>21</sup>

Whereas MacCormick focused solely on children, Kramer's marginal humans include infants, senile people, dead people, comatose people, mentally incapacitated and mentally infirm people. Although Kramer does not explicitly compare people in these categories to animals, he mentions them in connection with animals and thus suggests that all these categories are somehow to be assimilated.

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<sup>18</sup> Neil MacCormick, 'Children's Rights: A Test-Case for Theories of Rights', *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, Vol. 62, No. 3 (1976), p. 317.

<sup>19</sup> *ibid.*, p. 305.

<sup>20</sup> 'What has been said may suggest that one cannot believe in the category "moral rights" unless one accepts in some form the principle that sentient beings ought to be respected as ends in themselves. If that is so, I do not regret it.' (MacCormick 1976, p. 311).

<sup>21</sup> Kramer 2001, p. 30.



Kramer is reluctant to spell out the criterion for qualification as a potential legal right-holder. He seems not to want to accord this status to all beings who are conscious (and thus not to all animals), but only to those ‘conscious creatures that are sufficiently akin to ordinary human adults in respects which are morally significant’.<sup>22</sup> Although he is less precise than Singer or Regan in determining the property X that grounds normative position Y (being a right-holder), Kramer can nevertheless, in my view, be classified as a proponent of the AMC: he criticises theories that lead to the lowering of the moral and legal status of marginal human beings, and seems to lean on the idea of moral consistency when he advocates for the possibility of (some) animal legal rights.

The last example is drawn from Visa Kurki’s recent book, *A Theory of Legal Personhood*. Although Kurki focuses on the concept of legal personhood and not so much on the defence of animal rights, certain of his remarks made in *passim* come close to the AMC. Kurki’s way of putting the matter is more neutral than in the above examples: he simply notes that ‘[m]any will theorists share the conclusion that infants and animals, as well as severely mentally handicapped individuals, cannot hold rights’,<sup>23</sup> without the explicit moral condemnation that usually accompanies this observation. Kurki calls this the ‘hard will theory’ and distinguishes it from ‘soft’ will theories. A soft will theory (‘WT1’) allows children, and an even softer will theory (‘WT2’) allows mentally disabled individuals, to have rights through their *representatives*.<sup>24</sup> However, according to Kurki:

if we adopt WT2, it is rather difficult to see why nonhuman animals could not also hold legal rights, given that the appointed representative clearly cannot represent the *will* of the principal, but only his, her, or its *interests*. The representative is thus, roughly put, a trustee rather than an agent of the principal.<sup>25</sup>

In this condensed passage Kurki seems, first of all, to accuse (soft) will theorists of inconsistency: if the ‘representation-device’ can be used to salvage the rights of severely mentally disabled persons, why can’t it be used to make room for animal rights? The second assumption here is that the criterion for right-holding that also covers mentally disabled individuals cannot be autonomy, or the possibility to exercise freedom of choice, but can only be that of having interests. But once we allow having interests to be a sufficient criterion for having rights, animals cannot be excluded from the group of right-holders, since they clearly have important interests. Kurki adopts a view that is similar to Regan’s – i.e. that all sentient beings have ultimate value, and this grounds the possibility of their having rights.<sup>26</sup> In effect, Kurki employs a very similar strategy as is the case in respect of the AMC, albeit that he focuses more on the demand for consistency than on the levelling-down objection.

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<sup>22</sup> *ibid.*, p. 40. Of course, this excludes dead people and comatose people. Comatose people’s rights are briefly discussed below, but those of dead people are not addressed in this paper.

<sup>23</sup> Visa A. J. Kurki, *A Theory of Legal Personhood* (OUP, 2019), p. 66.

<sup>24</sup> *ibid.*, p. 67.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*, p. 64.

To sum up, we can say that, in their criticisms of the will theory, interest theorists lean heavily on the two perspectives that underlie the AMC: the demand for moral consistency and the unacceptability of levelling down the moral position of any human being. Interest theorists argue that will theorists cannot simultaneously respect these two perspectives: if they are consistent, they must deny the rights of marginal human beings (which, the assumption is, is to level them down). Conversely, if they want to include marginal human beings as right-holders, their theory cannot be consistent. The interest theory instead can easily accommodate both perspectives and is therefore superior to the will theory.

#### 4 How Could the Will Theorist Reply?

If a will theorist doesn't want to give up her theory, what possibilities are there? Must she either forgo the strongly held conviction that *all* human beings have rights, or adopt an inconsistent theory? Some will theorists do not shrink from the conclusion that rights do not extend to all human beings. Most famously, H. L. A. Hart in his early formulation of the will theory argued that:

If common usage sanctions talk of the rights of animals or babies it makes an idle use of the expression "a right", which will confuse the situation with other different moral situations where the expression "a right" has a specific force and cannot be replaced by the other moral expressions.<sup>27</sup>

However, it is important to note that this does not necessarily mean that one accepts the lowering of the moral status of children. The idea that if one denies rights to a particular group, one thereby makes its members worse off, is the supposition made by proponents of the AMC, not necessarily by those who are the targets of it. Hart, for example, thought that adults have a *duty* not to ill-treat babies, and that is all that is needed to describe the moral situation.<sup>28</sup> Later, however, he changed his views and allowed that children can have rights through their representatives. Nonetheless, he only had in mind children who will later become normal, rational adults: animals, as well as those human beings who will never be able to exercise their rights by themselves (i.e. those who are severely mentally disabled), were clearly not intended to be included in the category of right-holders.<sup>29</sup>

Hillel Steiner also admits that 'foetuses, minors, the comatose, the mentally disabled, and also... the dead and members of future generations – to say nothing of members of virtually all other known species – must all lack Will Theory rights'; but adds, '[h]ow morally damaging is this fact?'<sup>30</sup> Steiner's view is that this is not morally damaging at all, since these creatures' interests are protected by duties towards them – duties that are controlled by *other* people who hold the

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<sup>27</sup> H. L. A. Hart, 'Are There Any Natural Rights?', *The Philosophical Review*, Vol. 64, No. 2 (April 1955), p. 181.

<sup>28</sup> *ibid.*

<sup>29</sup> H. L. A. Hart, 'Legal Rights', in *Essays on Bentham* (Clarendon Press, 1982), p. 184.

<sup>30</sup> Hillel Steiner, 'Working Rights', in Matthew H. Kramer, N. E. Simmonds and Hillel Steiner, *A Debate Over Rights* (OUP, 1998), p. 259.

relevant powers. In other words, rights that are spoken of as, for example, ‘children’s rights’ are in fact the rights of those who have the power to demand the fulfilment of children-related duties. These right-holders are typically officials who can impose sanctions on those who, for example, mistreat or neglect their children.<sup>31</sup>

My own strategy for defending the will theory is to hold onto the idea that the point of rights is to protect and facilitate autonomy, but to understand autonomy (and its exercise) to apply to all human beings, including ‘marginal’ ones. Accordingly, I reject Steiner’s suggestion that their rights are in fact certain other people’s rights. I focus below on a group often mentioned by proponents of the AMC, namely people with intellectual disabilities. The rights of children are not discussed, since Hart’s proposal that their rights are looked after by their representatives has, as far as I can gather, been pretty well received and is not the most hotly contested issue between will and interest theorists.<sup>32</sup> Childhood, after all, is not a permanent state: most children grow up to be autonomous, rational beings. The contested issue concerns the rights of cognitively disabled people, who may remain in a childlike state for their entire life. How can the will theorist account for their rights, without having to admit that animals, also, must then have rights – i.e. without turning herself into an interest theorist? (Remember that the assumption is that animal rights can only be interest theory rights). This is the challenge tackled below.

## 5 The AMC from the Point of View of Disabled People

I will first briefly discuss a general objection levelled against the AMC. As we have seen, proponents of the AMC do not usually want to morally level down any human beings – on the contrary, their argument is based on natural opposition to that thought. However, from the perspective of nonparadigmatic humans themselves, the AMC might still feel insulting. The AMC is, even when it supports the positive outcome of improving the position of animals (and not making any humans morally worse off), still based on *comparing* marginal humans with animals and finding similarities between them. Now someone might retort that one shouldn’t be insulted by this since, after all, *all* human beings are animals. However, considering the way people with various kinds of disabilities have been treated in the past, this criticism of the AMC is quite understandable. As Gerald O’Brien reminds us, in many cultures severely cognitively impaired people, or ‘idiots’, were classified as ‘brutes’ or ‘animals’. Furthermore, people with disabilities have been exhibited in carnival sideshows, as examples of not fully human beings, and eugenic measures have even been taken against them – for example, in Nazi Germany – reinforced by the use of animalistic metaphors to describe disabled persons.<sup>33</sup> Thus, the full humanity of

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<sup>31</sup> *ibid.*, pp. 251-261.

<sup>32</sup> For criticism of the AMC that focuses on children’s rights, see Richard L. Cupp Jr., ‘Children, Chimps, and Rights: Arguments from Marginal Cases’, *Arizona State Law Journal* 45, no. 1 (Spring 2013), pp. 1-52.

<sup>33</sup> See Gerald V. O’Brien, ‘People with Cognitive Disabilities: The Argument from Marginal Cases and Social Work Ethics’, *Social Work* 48:3 (2003), pp. 331-337. Of course, as Visa Kurki pointed out to me, this presupposes the idiocy and inferiority of animals, which is the

disabled people, especially those with mental disabilities, has historically been questioned. Some worry that the AMC continues this tradition of dehumanisation: the mere fact of comparison, of lumping together marginal humans and animals, might invite this kind of thinking, even if the intentions of the AMC's proponents are good.

My own concern is that the self-understanding of people with disabilities is not sufficiently taken into account, and their capacities and abilities not sufficiently appreciated, either in the AMC or in the debate between the interest and the will theory of rights. The recent paradigm shift in how the rights of people with disabilities are understood emphasises their full equality with other people and their autonomous agency.<sup>34</sup> The term 'paradigm shift' intentionally invites comparison to Thomas Kuhn's famous way of characterising scientific revolutions as abandoning old theories and concepts and frameworks, and adopting instead a completely new way of looking at things.<sup>35</sup> In the context of thinking about disability, this means giving up the view of disabilities as being solely medical problems and 'personal tragedies' of individuals, and instead seeing disability as mainly a socially constructed problem, and the role of rights as enhancing disabled persons' autonomy and independence (rather than protecting their interests).<sup>36</sup>

This paradigm shift is visible in the UN Convention on the Rights of Persons with Disabilities (CRPD, 2006),<sup>37</sup> which states as its guiding principle '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.<sup>38</sup> It is noteworthy that disabled people played a central role in the drafting of the CRPD to the extent that it has been argued that 'never before in the history of the UN were the subjects of a treaty invited to play such a prominent role in the drafting process'.<sup>39</sup> It is thus clearly the wish of people with disabilities themselves to be treated as self-determining agents, rather than as objects of pity and charity. What Lucy Series

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kind of thinking that critical animal rights scholars want to dismantle. It remains to be seen whether the use of animalistic metaphors as a means of degrading humans will disappear in the future; but given the present, persistent ways of talking and thinking, over which the disabled themselves have no power, I think O'Brien's worries are not misplaced.

<sup>34</sup> About the paradigm shift, see Lucy Series, 'Disability and Human Rights', in Nick Watson and Simo Vehmas (eds.), *The Routledge Handbook of Disability Studies* (Routledge, 2020), pp. 72-87.

<sup>35</sup> Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962).

<sup>36</sup> See Series 2020, pp. 76-77. Licia Carlson talks of the 'personal tragedy model', which often accompanies the medical model, and which views disability 'as something inherently bad, objectively devalued, and worthy of pity, charity, and sorrow'. Licia Carlson, *The Faces of Intellectual Disability: Philosophical Reflections* (Indiana University Press, 2010), p. 5. However, Carlson also reminds us that we cannot completely do away with the medical model, as many intellectual disabilities are, after all, genetically based (*ibid.*, p. 7).

<sup>37</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 30 September 2020).

<sup>38</sup> CRPD, art. 3, section 1.

<sup>39</sup> A. Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Abingdon and New York: Routledge, 2015), p. 8 (quoted in Series 2020, p. 80).

tells us about the other principles of CRPD, and what principles were *excluded*, is quite astonishing:

Other principles [of the CRPD] reference equality, non-discrimination, respect for diversity, participation and inclusion, accessibility and respect for the ‘evolving capacities of children with disabilities’, but “protection” does not feature on this list. The language of “vulnerability” does not feature in the Convention, and was actively resisted by DPOs [disabled persons’ organisations].<sup>40</sup>

The idea that people with disabilities – also those with intellectual disabilities – do not want to be viewed as objects of protection, but instead as persons with full legal capacities, comes out also in the comments of the Committee on the Rights of Persons with Disabilities. The role of the Committee is to oversee and monitor the CRPD, and it is composed almost wholly of disabled persons. The comments of the Committee are authoritative interpretations of the CRPD, but not legally binding upon the states. The Committee has in fact offered interpretations so radical in nature that Series suspects that many states would have refused to ratify the treaty if the Committee’s interpretations were legally binding.<sup>41</sup> Thus although the Committee’s statements are contested, and not legally absolutely binding, they are of interest in relation to the will and interest theories of rights. For example, in its General Comment no 1, which provides guidelines concerning article 12 (Equal recognition before the law) of the CRPD, the Committee states that ‘[w]here, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the “best interpretation of will and preferences” must replace the “best interests” determinations’.<sup>42</sup> In the same comment the Committee also emphasises that people with disabilities – including those of ‘unsound mind’ – are agents and legal persons in the full sense of the word:

Legal capacity includes the capacity to be both a holder of rights and an actor under the law... Legal capacity to act under the law recognizes that person as an agent with the power to engage in transactions and create, modify or end legal relationships... “unsoundedness of mind” and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency).<sup>43</sup>

Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.<sup>44</sup>

As mentioned above, this is a radical claim: Lucy Series notes that ‘interpretations of the Convention, which divorce legal agency and the exercise of rights from the concepts of “mental capacity” and “mental disorder”, have

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<sup>40</sup> *ibid.*, p. 82.

<sup>41</sup> *ibid.*, pp. 79, 81.

<sup>42</sup> CRDP Committee, General Comment No 1 (2014), Section 21, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> (accessed 30 September 2020).

<sup>43</sup> *ibid.*, section 13.

<sup>44</sup> *ibid.*, section 15.

been described as “the most revolutionary of the new norms articulated in the CRPD”.<sup>45</sup> Nevertheless, these interpretations come from people with disabilities themselves. Even if they can be legally ignored, heed should be paid to them in the context of rights theories. In my view, CRPD and the comments of the Committee strongly suggest that the rights of people with intellectual disabilities – who are standard examples of ‘marginal humans beings’ in relation to the AMC – should be understood as will-theory rights, rather than as interest-theory rights. Of course, disabled persons’ self-understanding does not by itself decide theoretical debates about the nature of rights. We also need philosophical support for the argument that persons with severe intellectual disabilities can be viewed as autonomous agents, and thus holders of will-theory rights. In the next chapter I suggest that recent theorising about the concept of autonomy that emphasises its social and relational aspects can provide such support.

## 6 Autonomy and Disability

As we have seen, what unites proponents of the AMC such as Tom Regan, ‘hard’ will theorists and interest theorists is the idea that mentally disabled people are not autonomous. Therefore, they either have no rights, or their rights are based on something other than the capacity to make autonomous choices (in which case we have no reason to withhold rights from animals). What conception of ‘autonomy’ is in play in circumstances where the autonomy of a mentally disabled person is denied? It is clearly one in which autonomy is primarily a matter of the *individual*. As has been noted above, the AMC works by comparing individuals and their capacities, and by demanding that we accord the same moral property to all individuals who have a certain capacity, regardless of the species to which they belong.

If autonomy is understood in terms of the capacity of an individual – as it is in the AMC, as well as in classical liberalism – then it is natural to come to the conclusion that people with various cognitive and intellectual disabilities are not autonomous. A classical liberal conception of autonomy construes it as an individual’s capacity to govern herself. Tom Beauchamp and James Childress’s formulation – rooted in John Stuart Mill’s individualism – that autonomy is the ‘personal rule of the self that is free from controlling interferences by others and from personal limitations that prevent meaningful choice’ is a good example of this.<sup>46</sup> In this perspective, an autonomous person is an isolated, independent individual with whose choices others must not interfere, and who does not suffer from any ‘personal limitations’. This lack of limitations can be positively construed as the presence of two kinds of capacity. *Competency capacities* include ‘various capacities for rational thought, self-control, and freedom from debilitating pathologies, systematic self-deception, and so on’, and *authenticity capacities* include ‘the capacity to reflect upon and endorse (or identify with)

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<sup>45</sup> Series 2020, p. 82.

<sup>46</sup> Tom Beauchamp and James Childress, *Principles of Biomedical Ethics*, 4th ed. (OUP, 1979), p. 121, quoted in Carolyn Ells, ‘Lessons About Autonomy from the Experience of Disability’, in *Social Theory and Practice*, Vol. 27, No. 4 (October 2001), p. 608.

one's desires, values, and so on'.<sup>47</sup> If autonomy requires that these capacities are exercised independently, without 'interferences by others', then clearly people with intellectual disabilities are not autonomous, since they, by definition, lack the ability for abstract thought and formal reasoning that is presupposed in both the competency and authenticity conditions of autonomy.<sup>48</sup>

Nowadays, however, this individualist conception of autonomy is under challenge. It has been pointed out that autonomy is not an either/or property of an individual, but a complex cluster of abilities and attitudes whose constitution and exercise require a social context.<sup>49</sup> Autonomy is thus increasingly seen as a *relational* concept, and something that admits of degrees and variations as people's situations and social relations differ. There are many levels at which intersubjective relations are essential for autonomy. One can take a metaphysical perspective and view other people as transcendental conditions for the possibility of self-consciousness: that is, human beings become conscious of themselves as having freedom of choice only if they are recognised by others as having such freedom.<sup>50</sup> From a more empirical perspective, it may be noted that other people are necessary for the acquisition of certain psychological capacities and attitudes that the exercise of autonomy requires. As, for example, Joel Anderson and Axel Honneth have identified, in order to really be able to exercise autonomy, an individual needs certain 'second-order' psychological capacities and attitudes towards herself, and not merely the abovementioned competency and authenticity capacities. These second-order, self-directed capacities cannot be developed without the support of, and context provided by, other people.<sup>51</sup>

Anderson and Honneth individuate these capacities as *self-trust*, *self-respect* and *self-esteem*. Someone has self-trust when he or she 'has an open and trusting relationship to his or her own feelings, desires, impulses, emotions, and so on'.<sup>52</sup> Self-trust is essential for the exercise of autonomy, insofar as without it, one doesn't learn to *value* one's subjective desires and take them as 'material for

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<sup>47</sup> See Christman, John, 'Autonomy in Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall 2020 edition), Edward N. Zalta (ed.), available at <<https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/>> (accessed 26 September 2020).

<sup>48</sup> The term 'mentally retarded', which was the clinical term used before the current term 'intellectual developmental disorder' gained acceptance (see fn. 1) means scoring lower than 69 on an IQ test, and experiencing difficulty in learning as much and as quickly as a person not similarly affected, and in retaining information, and, in particular, failing to engage in abstract thought and demonstrating the capacity to apply principles identified in one situation to another situation. See David Shoemaker, 'Responsibility and Disability', in *Metaphilosophy* (Vol. 40, Nos. 3–4, July 2009), p. 440.

<sup>49</sup> One of the most thorough introductions to this theme is to be found in Catriona Mackenzie and Natalie Stoljar (eds.), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP, 2000).

<sup>50</sup> Antti Kauppinen clarifies these conditions proposed by German idealists such as Fichte and Hegel. See Antti Kauppinen, 'The Social Dimension of Autonomy', in Danielle Petherbridge (ed.), *Axel Honneth: Critical Essays* (Brill, 2011), pp. 261–265.

<sup>51</sup> Joel Anderson and Axel Honneth, 'Autonomy, Vulnerability, Recognition, and Justice', in John Christman and Joel Anderson (eds.), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005), pp. 127–149.

<sup>52</sup> *ibid.*, p. 133.

deliberation'<sup>53</sup> – for autonomy is, after all, about deliberating on and pursuing what one wants. The acquisition of this capacity requires that in early childhood we have someone who caringly and lovingly responds to our needs, even in the face of the aggression that small children at some point show towards the person who is taking care of them, and is thus inseparable from intimate relations. Such relations can be supported at societal level by family-oriented policies such as parental leaves and parental education and guidance.<sup>54</sup> Furthermore, in addition to learning to recognise one's *own* wants and preferences, such caring relations also teach one to recognise the needs and emotions of *others*. The ability to enter into reciprocal emotional bonds can likewise be seen as a precondition for autonomy.<sup>55</sup>

The capacity of self-respect refers to a view of oneself as a 'competent deliberator' and 'legitimate co-author of decisions'.<sup>56</sup> In other words, one must feel oneself to be on an equal standing with others: as someone who is, on the one hand, consulted in disputes about what to do; and on the other hand, as someone to whom others feel required to give reasons and not simply 'brute orders'.<sup>57</sup> A person who is not treated in this way by other people will unlikely be able to trust her own judgement and stand up for it, but will instead become passive and submissive, and lack genuine ability to exercise her autonomy. Thus, various types of subordination, marginalisation and exclusion are threats to the development of self-respect. Interestingly, Anderson and Honneth view *rights* as essential to self-respect. Rights are a sort of universal, institutionalised recognition of the equal moral standing of all and are especially important for those who are vulnerable to the threats outlined above. The role of rights in Anderson and Honneth's 'recognitional model' is thus not only to protect individuals from interference, but also to provide positive support for self-respect.<sup>58</sup> This, in my view, aligns well with the spirit of the CRPD.

The third capacity is that of self-esteem. This means, roughly, that one sees one's projects and endeavours as worthwhile and meaningful. But this is, once again, not an attitude that an individual can simply decide to have by herself, but one that depends on *others* recognising the activities as such. If some activities, careers or identities are symbolically 'negatively loaded' – i.e. if they are systematically denigrated or ridiculed in society – they are easily given up and not viewed as worthwhile options, even if deep inside one feels otherwise. The exercise of autonomy is thus bound up with what symbolic meanings different identities and activities carry.<sup>59</sup> In other words, we are *semantically* vulnerable

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<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*, p. 135; Kauppinen 2011, pp. 268-269.

<sup>55</sup> The capacity for reciprocal emotional bonds – of which most people with intellectual disabilities are capable – as a condition for autonomy is mentioned in Amy Mullin, 'Children and the Argument from "Marginal" Cases', *Ethical Theory and Moral Practice* (14:2011), pp. 291–305.

<sup>56</sup> Anderson and Honneth (2005), p. 132.

<sup>57</sup> Kauppinen (2011), p. 270.

<sup>58</sup> Anderson and Honneth (2005), pp. 131-133.

<sup>59</sup> *ibid.*, pp. 135-137.



as regards our self-esteem. Kauppinen explains semantic vulnerability in this way:

[T]he significance attached to a way of being and doing is a linguistic matter, and as such is not controlled by an individual's intentions. Instead, it is a matter of connections established through use and repetition in language games, patterns of talk, action and attitude.<sup>60</sup>

In addition to having a crucial role in the acquisition of self-trust, self-respect and self-esteem, other people play a more mundane and concrete role in the everyday exercise of autonomy. Think of a typical situation – having to make a fairly important decision that might have far-reaching consequences for one's life. What do most of us do? We discuss the matter with our family, friends or colleagues (or, as the case may be, social media followers) and deliberate together with them. We use other people to support our agency – as 'prostheses'<sup>61</sup> – when we, for example, do not trust our own memory ('please remind me to send him a birthday card') or when they know something better than we do ('could you check that I've spelled this correctly, you're better at it than I am') or when we put into effect some decision (such as moving to a new apartment) etc. The web of social relations in which and by means of which we exercise our autonomy is so self-evident to us that we often fail to notice it and mistakenly attribute greater weight to our independence and self-sufficiency than is warranted.

Once we see clearly how dependent we all are on other people's help and support for the constitution and exercise of our autonomy, we can start to consider again, for example, Regan's outright denial that 'morons' (i.e. people with intellectual developmental disorders) are autonomous. This denial may reflect attitudes that were common before the 'paradigm shift' discussed above rather than being an accurate description of disabled persons' abilities. It is certainly the case that mentally disabled people have historically been denied the kind of social recognition by others that is shown above to be essential for autonomy. In many cases they have been separated from their parents in early childhood and confined to institutions where they have not received the care and love that is necessary for the development of self-trust; they have not been treated with respect or regarded as co-deliberators in respect of issues – such as sterilisation – that have a direct bearing on them. Furthermore, they have a semantic vulnerability, one example of which is the long tradition of comparing them to animals. This comparison represents a repeated language-game and pattern of talk over which disabled persons themselves have no control, and which may lead to their not having the self-esteem to demand similar rights as other human beings.<sup>62</sup>

Conversely, changing social attitudes open up a multitude of possibilities in respect of the autonomy of people with intellectual disabilities. First, if they are

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<sup>60</sup> Kauppinen (2011), p. 272.

<sup>61</sup> The image of other people's help as kind of mental 'prostheses' is drawn from Leslie P. Francis, 'Understanding Autonomy in Light of Intellectual Disability', in Kimberley Brownlee and Adam Cureton (eds.), *Disability and Disadvantage* (OUP, 2009), pp. 205-208.

<sup>62</sup> On the history of intellectual disability, see Carlson 2010, pp. 21-51.

cared for and loved in early childhood, there is no hindrance to most intellectually disabled people developing reciprocal emotional bonds with their carers. Although the existence of such bonds do not require a capacity for abstract formal reasoning and second-order reflection on one's desires (abilities that characterise full-fledged exercise of autonomy), it nevertheless calls for abilities that, contrary to historical prejudices, children with intellectual disabilities do have: for example, the ability 'to prefer some people and some types of relationship to others, to recognise others as being in relationship with oneself, and the ability to respond to others emotionally'.<sup>63</sup> In adulthood, people with intellectual disabilities can, to a greater or lesser extent, be autonomous with the help of *supported decision-making*. Supported decision-making is a

system in which people work together to understand an individual's desires and choices and then provide the means for that person to exercise their legal capacity and live life in the way he or she chooses as opposed to a way imposed by someone else's decision made on their behalf... The support varies from gathering information and explaining it to the individual, assisting the individual to understand the consequences of a decision, and assisting in using assistive and communicative devices.<sup>64</sup>

Thus, supported decision-making is different from *substituted* decision-making, where the guiding principle is the disabled person's best interests, rather than her will. Nandin Devi argues that the CRPD is committed to supported, rather than substituted decision-making, also in relation to persons with profound intellectual disabilities. This is made clear, for example, in the *Handbook for Parliamentarians on the Convention* (issued by the CRPD Committee), in which it is stated that 'even when an individual with a disability requires total support, the support person(s) should enable the individual to exercise his/her capacity to the greatest extent as possible, according to the wishes of the individual'.<sup>65</sup> To be sure, as noted above, it is a radical claim to assert that even adults with severe cognitive disabilities have full legal capacity. Nonetheless, once we start thinking of autonomy (that is presupposed in the idea of legal capacity) as not inhering wholly in the individual, but as something the exercise of which requires support to a greater or lesser degree from other people, there are no conceptual barriers to thinking of even profoundly intellectually disabled persons as capable of autonomy. Even if they may not be able to communicate with language or signs or pictures, they can be 'observed in a friendly manner' for a sufficient period of time for their gestures to be understood and they can be involved in choices concerning their lives.<sup>66</sup> As I have tried to show above, we all rely, more than is usually acknowledged, on

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<sup>63</sup> Mullin 2010, p. 300. As David Shoemaker points out, in adulthood people with intellectual disabilities are often *more* sensitive to the feelings and distress of others than persons who do not have such disabilities. See Shoemaker 2009, p. 444.

<sup>64</sup> Nandini Devi, 'Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities', in *Journal of Law, Medicine and Ethics, Special Issue: Human Rights and Disability* (Winter 2013), p. 795.

<sup>65</sup> *Handbook for Parliamentarians on the CRPD* (2007), p. 89, quoted in Devi (2013), p. 795.

<sup>66</sup> *ibid.*, p. 801.

other people's support in our everyday exercise of autonomy, and were completely at other people's mercy in early childhood when the basic emotional capacities necessary for the exercise of autonomy developed.

## 7 The Most Marginal of Marginal Cases

The objection might be voiced that even this encompassing, relational conception of autonomy still excludes some human beings. Those are the most marginal of marginal cases: irreversibly comatose people who are totally unresponsive to the external world and with whom there are no methods of communication. As we have seen, comatose people were mentioned, for example, in Kramer's list of those beings whose rights the will theory cannot explain. How should a theory of rights – or a theory of autonomy – view them? Since there is no means of finding out their subjective will, must we conclude that they cannot have rights? Or, if we grant them rights, why couldn't we then also grant rights to animals, for it seems that comatose peoples' rights can only be interest theory rights?

I will only glance briefly at this extremely difficult issue here. First, if comatose people are problematic in relation to the will theory, they are equally problematic in relation to the interest theory, since in the context of the latter sentience is typically the threshold criterion for rights. Matthew Kramer in fact adopts a somewhat surprising stance when he explains the rights of comatose people in the following terms:

[N]otwithstanding that comatose people undergo no experiences, their similarity to mentally competent human adults is profound. Their status as right-holding subjects derives from the fact that they belong to the same species as the paradigmatic right-holders – viz., mentally competent human adults.<sup>67</sup>

Thus, in respect of comatose people, rights are based on belonging to the human race rather than on sentience. But if an interest theorist allows this speciesist solution in relation to comatose people (which in my view is not in itself objectionable), then it seems that their theory is no less inconsistent than the will theory supposedly is.

Second, as we have seen, the CRDP Committee enjoins us to use the 'best interpretation of will and preferences', rather than 'best interests determinations', in cases where it is not practicable to determine the will and preferences of an individual. Thus, the wish of disabled people, as represented by those on the Committee, seems to be that the will, rather than the interests, of a comatose person should guide her treatment. In some rare cases the comatose person may have given advance directives concerning her treatment – the person might, for example, have forbidden the use of all life-sustaining devices, such as ventilators, in case she falls into a vegetative state – in which case they clearly should prevail, even against the opinion of that person's carer. Where no advance directives have been made, and perhaps no family members or friends provide support, the person who cares for and makes decisions on behalf of the comatose person must simply rely on common knowledge of what it is to be human, and

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<sup>67</sup> Kramer 2001, p. 46.

her moral intuition of what it is to be treated in a dignified way even in a state of total helplessness. Such treatment includes things like continuing to call the person by her name, even if she doesn't respond to it; or looking into her face when encountering her, instead of treating her like an inanimate object. I daresay this is how the person would *want* to be treated, but I'm not sure whether it makes sense to say that it is in her *interests* to be so treated. Perhaps both the 'will and preferences' and 'best interests' principles would lead to exactly the same treatment; but it seems more natural, when considering the comatose person's treatment, to ask, 'What would she want?', rather than the more impersonal question 'What is in her best interests?' The former question seems to capture better the distinctively human dimension of this situation. On the other hand, if the comatose creature were, say, a dog – even a much-loved family pet – a question about its treatment would probably be framed in terms of its interests. Thus, even in the case of a comatose person, the notion of autonomy – her subjective will – seems to play a role in deciding her treatment; but I admit that this is a contested issue on which people's moral intuitions may vary.

## 8 Conclusion: What about Animal Rights?

This article argues that people with intellectual disabilities can be meaningfully said to have and exercise autonomy. Therefore, there is no theoretical barrier to their having will-theory rights. If this is so, what implications does it have for the AMC, construed as a defence of animal rights? Does autonomy provide the criterion by means of which we can neatly demarcate all humans from non-human animals and thus reserve the moral (or legal) status of 'right-holder' only to human beings? In other words, are those who want to draw a moral boundary between human and non-human animals not being inconsistent after all?

The debate about animal rights is by no means over even if the argument concerning intellectually disabled persons as bearers of will-theory rights is accepted. There are (at least) two avenues through which to argue in favour of the possibility of animal rights. First, one can argue that even if we could construe all human rights as will-theory rights,<sup>68</sup> animals can also still have rights but the function of those rights would be something other than the protection of autonomy. In other words, there can be two kinds of rights – will-theory rights for human beings and interest-theory rights for animals. I do not rule out this possibility, but merely note that a theory that offers a single explanation for all rights would be, if viable, preferable to one that is more complex. Furthermore, conflicts between rights will proliferate in tandem with the proliferation of rights and right-holders. Some might view this as a decisive

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<sup>68</sup> This article does not make so strong a claim, but only the more moderate one that the rights of people with intellectual disabilities can be understood as will-theory rights. However, given that the rights of small children can be realised through their representatives, and that the upholding of these rights can be seen to support and protect their future autonomy as human beings, I do not think that it is impossible to view all human rights as will-theory rights. It is not possible to discuss the issue further here.

reason to abandon a theory that allows animals to have rights, if there is a plausible alternative to it.<sup>69</sup>

Another possibility is to seek to demonstrate that animals can also be autonomous – at least to the extent viable for intellectually disabled people – and thus can have will theory rights. This is of course a version of the AMC. For example, Tom Beauchamp argues in favour of the idea that many non-human animals have similar or even a higher capacity for autonomy than some human beings:

Philosophical theories... typically ignore striking evidence of types and degrees of self-awareness of nonhuman animals, not to mention the pervasive presence of intentionality in animals and comparative studies of the brain. In some striking studies, language-trained apes appear to make self-references, and many animals learn from the past and then use their knowledge to forge intentional plans of action for hunting, stocking reserve foods, and constructing dwellings, for example... Such abilities of nonhuman animals... provide plausible reasons to attribute elementary self-consciousness and some degree of autonomy to nonhuman animals... A nonhuman animal may overtake a human whenever the human loses a measure of mental abilities after a cataclysmic event or a decline of capacity. If, for example, the primate in training in a language laboratory exceeds the deteriorating Alzheimer's patient on the relevant scale of high-level mental capacities, the primate may achieve a higher level of autonomy.<sup>70</sup>

If non-human animals can be autonomous, and if autonomy is the basis of rights, then the boundaries of right-holding need not, after all, follow the human/animal divide. But matters are more complicated than this. One means by which to hold onto the idea that autonomy is a distinctively *human* property that confers a special moral worth on humans is to attach the idea of *responsibility* to autonomy. Another way to put this is to say that autonomy is connected with the idea of *moral* agency, and not only to the kind of intentional behaviour that Beauchamp shows to be possible for animals.<sup>71</sup> Moral agents are those to whom it makes sense to attribute moral responsibility, or whose actions can be praised or blamed. The prevailing consensus is that animals are not moral agents: we do not describe their actions as right or wrong and do not hold them responsible. But the obvious problem now is as to whether we hold intellectually disabled people responsible? Does it make sense to blame or praise them if they cannot properly control their impulses or understand the consequences of their

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<sup>69</sup> Anna-Karin Andersson opines that 'the increased risk of rights conflicts is sufficiently undesirable to justify controversial exclusion of certain subjects from the class of rights bearers'. Ann-Karin Margareta Andersson, 'Choices, Interests, and Potentiality: What Distinguishes Bearers of Rights?', *Journal of Value Inquiry* 47 (2013), p. 177.

<sup>70</sup> Tom L. Beauchamp, 'Who Deserves Autonomy, and Whose Autonomy Deserves Respect?', in James Stacey Taylor (ed.), *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy* (Cambridge University Press, 2005), pp. 324-325. The US-based Nonhuman Rights Project, that utilises litigation to seek to persuade the courts to grant legal personhood and basic legal rights to chimpanzees and some other mammals, also refers to the 'practical autonomy' of those animals to support their argument (see Wills 2020, p. 200).

<sup>71</sup> Beauchamp himself draws a distinction between *metaphysical* and *moral* autonomy and argues that animals are not autonomous in the latter sense. However, in his view, neither are marginal human beings. Beauchamp 2005, pp. 322-326.

actions? If the idea of their being responsible is absurd, then this attempt to demarcate human beings from animals also fails. Proper discussion of the question of the moral (or legal) responsibility of intellectually disabled people would require another paper. I will end by simply noting that there are philosophers and disability scholars who do not reject this idea outright: they point out that responsibility (like autonomy) is a complex concept that admits of degrees and depends on the social context;<sup>72</sup> and by underlining that such legal concepts as ‘diminished responsibility’, and the ‘insanity defence’ are applicable to people who suffer from mental disorders, but not to animals.<sup>73</sup> This indicates that despite the AMC’s proponents’ attempts, the moral and legal boundaries between human beings and animals are not easily erased.<sup>74</sup>

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<sup>72</sup> See, e.g., Shoemaker 2009 and Simo Vehmas, ‘Disability and Moral responsibility’, *Trames* 15 (65/60) 2011, pp. 156–167.

<sup>73</sup> An obvious counter-example is the responsibility of infants: surely they are like animals in that it makes no sense to hold them morally responsible for anything they do? There’s no space to discuss this issue here, other than to briefly remind the reader of the differences between *raising* human and animal infants: we *teach* human children the difference between right and wrong, to take responsibility for their actions, to apologise, forgive, etc., whereas it makes no sense to conceptualise the teaching of rules to animals in this way.

<sup>74</sup> I would like to thank Visa Kurki, Seppo Sajama and Markku Oksanen for useful comments on this article, and Rupert Haigh for checking my English.